

Fast Random-Access Memory (Laws) – The June 2018 Amendments to the Polish “Holocaust Law”

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I know what you are thinking: oh no, it's Poland again.

After a lengthy period of sitting in a remote corner as far as global academic focus on constitutional law is concerned, all the while eclipsed by much more exciting locales such as Afghanistan or Saarland, we're finally in the spotlight. In hindsight, I wish we weren't, because we're there for all the wrong reasons. From the hostile takeover of the Constitutional Tribunal, through the ongoing assault on the Supreme Court and undermining the ombudsman, the governing party Prawo i Sprawiedliwość (ironically, the name translates as “Law and Justice”) has launched an all-out attack on the rule of law, democracy and human rights in Poland. The slowly creeping depredations of Orbán and Erdogan pale compared to how rapidly did PiS move to undermine the Polish constitutional order, yet they insofar fell short of amending the basic law itself (since, for all their sabre-rattling and declarations of being supreme executors of sovereign's unlimited will, PiS lacks the parliamentary majority necessary to amend the Constitution). All this happened since autumn 2015, over a mere two and a half years.



But today I am not going to talk about years, months or weeks. Not days, even. Hours and minutes are the matter at hand, for on June 27th Polish authorities broke the national record in speed of proceeding a bill in Parliament and getting it signed into the law by the President. And we are not talking about just an ordinary bill. The statute in question is the (in)famous Polish “Holocaust bill” or “Polish death camp law”. Verfassungsblog and others have written a great deal about what technically was an amendment to the existing *Law on The Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation*, so I'll try to keep it brief. The above-mentioned law, aside from setting up the Institute itself, outlines a slew of criminal offences related to Poland's complicated past. Just a few months ago the law was amended by means of introducing art. 55a which provided a new criminal offence of ascribing to the Polish Nation or to the Polish State, in public and against the facts, responsibility or co-responsibility for Nazi crimes committed by the Third Reich or for other offences which are crimes against peace [or] humanity or [that are] war crimes, or otherwise grossly reducing the responsibility of the actual perpetrators of said crimes. Furthermore, art. 55b provided that art. 55a would apply to foreigners as well, regardless of locally binding regulations at the place at which the act took place. There was no hiding from Polish justice by wearing those “Auschwitz was a Polish Death Camp, Not German!” t-shirts in the Caribbean or North Korea.

The intent of the law, as outlined by the Polish government, was to defend the good name of Poland and to halt the practice of ascribing ownership of Nazi concentration camps to

Poland and Poles. Whether the actual text of art. 55a enshrined a legal norm which would achieve such goals wasn't all that clear, as several scholars of Polish criminal law pointed out. Academic discourse aside, you can probably see the major problem arising from the afore-mentioned laws as written, for they paved the way to possible persecution of anybody who would state the obvious historical fact: that Poles, notwithstanding their frequent heroism in helping Jews (as evidenced by thousands of Righteous Among Nations titles awarded to Polish citizens) did, on many occasions, turn against their Jewish neighbours, frequently with tragic outcome.

Of course, such weaponization of memory laws did not go unnoticed. Matter of fact, it has thrust Poland into one of biggest diplomatic crises in its recent history. For the first time since 1989, Poland found itself in direct confrontation with Israel and unsurprisingly, with the United States. Both countries applied increasing diplomatic pressure on Poland, which yielded results. President Andrzej Duda submitted the abovementioned laws for review by the Polish Constitutional Tribunal. But, as we all know by now, the Constitutional Tribunal is mostly a hollow shell of its former self, led by a manifestly politicised President of the Court, ready to fulfil any commands issued by the power behind the throne, the PiS chairman Jarosław Kaczyński. So much for throughout judicial review. Additionally, on 20th Feb 2018, the Marshal (speaker) of the Senat (the upper chamber of Polish parliament), Stanisław Karczewski (PiS), stated that „the law (art. 55a and 55b – J.J.) will be effectively frozen from now on and will not be enforced”. Take that, *Rechtsstaat*, this is how you rule the law instead of allowing it to rule you!

Since then, art. 55a was indeed in a state of limbo. The Polish *Prokuratura* (Prosecutor's Offices) received dozens of reports on violation of art. 55a from erstwhile defenders of Polish national pride but took no action. No arrests were made, and no charges were brought against anyone. Yet the pressure, both academic and political, did not go away. The U.S. was still unhappy with that state of affairs and diplomatic circles began to whisper about Americans considering using their trump (sorry, couldn't resist) card: the threat of downplaying the recently upgraded American military presence in Poland. It goes without saying that if you sit next to Russia, you likely want more U.S. soldiers on your soil, not fewer, if you know what is good for you. And then, taking everyone by total surprise, on 26th June 2018 the Polish government went into full „hold my beer” mode. What happened over the course of eight and a half HOURS on the subsequent day was of no precedent in history of democratic Polish parliamentarism and perhaps in history of any democratic parliamentarism.

Some quick background information: Polish legislative process is rather arcane, as you could expect. Once the proposed bill is lodged with the Marshal of the *Sejm* (the lower chamber of the parliament), it goes through three readings which encompass both work within parliamentary committees and in the plenary. Once the *Sejm* adopts the bill, it is sent over to the *Senat* (the upper chamber) for consideration. One of possible outcomes is that the *Senat* can accept the bill with no amendments, which leads to the bill being sent to the President for assent. The President may either sign it into law, send it over to the Constitutional Tribunal for review or refuse to sign the bill and thus exercise his over-turnable power of veto. The entire procedure is outlined in the Constitution and detailed in rules

of procedure for both chambers of then parliament, which describe the nitty gritty inner workings of the *Sejm* and the *Senat*. Several special legislative procedures exist, most importantly the procedure for adopting urgent bills, more on which later.

The following sequence of events was duely reconstructed by [Ceiling: Sejm, a Facebook page ran by an anonymous academic vigilante pretending to be a cat whom I wrote about earlier](#) on Verfassungsblog. I take no credit for the following timeline apart from translating it and providing some commentary. Hat's off to you, Cat.

June 26th <time unknown>: The Council of Ministers (the Polish government) adopts the proposed bill, designating it is an urgent bill according to art. 123 of the Polish Constitution.

June 26th <21:05> The proposed bill is uploaded to the website of Government Centre for Legislation (the government's legislative support unit).

June 27th <09:13> The Marshal of the *Sejm* opens the plenary.

June 27th <09:14> The Marshal informs the plenary about an amendment to the daily schedule by means of adding the discussed bill.

June 27th <09:28> Opposition deputies put forth a formal notion to delay the plenary until 12:00. The notion is rejected by a majority made up of PiS deputies.

June 27th <09:28> The first reading of the proposed bill commences.

June 27th <09:45> The opinion on the draft bill prepared by Polish Ministry of Foreign Affairs is uploaded to the Government Centre for Legislation's website.

June 27th <10:47> The *Sejm* decides, on a notion brought forth by a PiS deputy, to immediately move the bill to the second reading. You can by now probably guess who voted in favour of this notion.

June 27th <11:29> The *Sejm* adopts the final text of the bill, rejecting all amendments proposed by opposition deputies. The bill is then forwarded to the *Senat*.

June 27th <12:21> The *Senat's* Committee on Human Rights, The Rule of Law and Petitions commences work on the draft bill. It proposes no amendments.

June 27th <17:09> The *Senat* adopts the bill with no amendments, meaning that the procedure in the parliament is over and the bill is sent over to the President.

June 27th <17:58> The President signs the bill into law.

Total time elapsed from the first reading to signing the bill into law: 8 hours and 30 minutes.

So, once the shock resulting from this legislative *Blitzkrieg* is over, the question arises: was this this legally possible? First of all, the Constitution of the Republic of Poland provides, in art. 123, the procedure for consideration of urgent bills. Under that procedure, The Council of Ministers can classify any proposed bill as urgent unless it falls into one of several substantive categories, which was not the case with the discussed bill (it would be if Polish criminal law wouldn't be scattered all over the legal system and instead codified solely within the Criminal Code, since codices cannot be considered as urgent bills. Alas, that was

not the case.) The Constitution outlines two consequences of a bill being classified as urgent: the shortening of the time period for its consideration by the Senat (14 days, down from 30) and for its signature by the President (7 days, down from 21). The Constitution leaves further detailed modifications of the legislative procedure to be defined in the rules of procedure of the *Sejm* and the *Senat*. However, what the Constitution does also say in art. 119 is that the *Sejm* considers every bill over the course of three readings. While formally the bill did indeed pass through three readings, one can hardly see it as “considered” in any substantial sense of that word. The Polish Constitutional Tribunal has, on several occasions, noted that the principle of three readings must be understood in a way that it requires three separate considerations of the draft bill by *Sejm* in a substantive manner, not merely technical or formal (judgments K 31/12, K 37/03 and K 53/07). Of course, given the current state of the Tribunal, one can hardly count on it to eventually review the bill in accordance with its own case law.

But hey, you might ask, you’re kind of nit-picking here and taking cheap shots while the real deal is that a rather heinous chunk of law is gone. Shouldn’t we be celebrating instead? Well... First of all, the problematic criminal elements of the law are gone. This is good and is pretty much the minimum one could expect from a self-reflective lawmaker. Academic and journalistic integrity are no longer under threat, a healthy public debate on the Polish role in Holocaust is possible once again (not that it ever was a healthy debate to begin with) and one does not have to wonder whether posting this article on Verfassungblog constitutes “scientific activity” and thus is hopefully exempt from eventual criminal persecution under art. 55a. Phew!

But not all is well. While art. 55a and 55b are no more, art. 2a remains in force. Art. 2a extends the area of activity of *The Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation* (including its competences to carry out criminal investigations and bring forth charges) to activities of Ukrainian nationalists and members of military units collaborating with Nazi Germany. This amendment has opened a massive can of worms in already strained Polish-Ukrainian relations, better discussed elsewhere. Suffice to say, striking out this article could have been as simple as it was with the other two.

But the biggest issue is the evisceration of *Rechtsstaat* principles as enshrined in art. 2 of the Polish Constitution. Quality of law? How can you ensure quality of law over the course of eight and a half hours? Certainty of law, both as to the procedure of its adoption as to its content? Gutted. The case of law Polish Constitutional Tribunal, back from the days when it was an effective defender of constitutional order? Ignored. Over 20 years ago, The Constitutional Tribunal wrote: “in a lawful democratic state (...) the adoption of law should be conducted in a manner which allows the participants of legislative process to consider all proposals and to take into consideration all positions and arguments” (judgment K 18/95). The legislative process cannot be instrumentalised in the way it occurred on June 27th. Regardless of whether the subject matter of legislation is doing away with highway tolls so that Władysław and Grażyna can enjoy a smooth ride to Baltic seaside, or striking down laws which were obviously, blatantly and manifestly faulty to begin with, one cannot in good faith respect art. 2 of the Polish Constitution by acting with such reckless haste.

This is likely a topic for another paper, but suffice to say, this isn’t the last we’ll be hearing

about crises and tensions arising from Poland's increasing militant memory laws. In fact, once the dust settled down after the amendment, an entirely new political crisis in Israeli-Polish relations ignited over the political statements made by both countries' governments. At least with the MELA (Memory Laws in European and Comparative Perspective) project in full swing we can expect some top-notch critical assessment of the topic in the coming years. Meanwhile, to sneak some World Cup into this, the Polish ruling party has succeeded to ridicule itself: first, by shooting the ball into their own goal and second, by desperately kicking the ball out from inside the goal long after the referee already awarded the score.

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